INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact	3
1. The creation of ILO	3
2. Pre-election threats	4
3. Petitioner's unilateral changes in its operations	5
4. The ILO strike	6
5. ILO's attempt to obtain Teamster support	8
B. The Board's conclusions and order	9
C. The court of appeals decision	10
Argument	10
Conclusion	14

CITATION

Cases:

Berkshire Knitting Mills v. *National Labor Relations Board*, 139 F. 2d 134, certiorari denied, 322 U.S. 747	12
Cleaver-Brooks Mfg. Corp. v. *National Labor Relations Board*, 264 F. 2d 637, certiorari denied, 361 U.S. 817	12
Harbor Carriers of Port of New York v. *National Labor Relations Board*, 306 F. 2d 89, certiorari denied, 372 U.S. 917	11
Michigan Consolidated Gas Co. v. *Federal Power Commission*, 283 F. 2d 204, certiorari denied, 364 U.S. 913	14

230-437—66——1

Cases—Continued

	Page
National Labor Relations Board v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, certiorari denied, 375 U.S. 834	12
National Labor Relations Board v. *Florida Agricultural Supply Company, etc.*, 328 F. 2d 989	12
National Labor Relations Board v. *Ford Radio & Mica Corp.*, 258 F. 2d 457	12
National Labor Relations Board v. *Retail Clerks International Association*, 211 F. 2d 759, certiorari denied, 348 U.S. 839	12
National Labor Relations Board v. *Stilley Plywood Co.*, 199 F. 2d 319, certiorari denied, 344 U.S. 933	12
Precision Fabricators v. *National Labor Relations Board*, 204 F. 2d 567	13
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	11
Statutes:	
Administrative Procedure Act, Section 5(b), 60 Stat. 239	13
National Labor Relations Act (49 Stat. 449, as amended, 29 U.S.C. 151, *et seq.*)	
Section 2(11)	13
Section 8(a)(1)	9
Section 8(a)(2)	9
Section 8(a)(3)	9
Section 8(a)(5)	9
Miscellaneous:	
18 C.F.R. § 1.18(e)	14
29 C.F.R. § 102.51	14

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 397

SEA-LAND SERVICE, INC. AND SEA-LAND OF PUERTO RICO, A DIVISION OF SEA-LAND SERVICE, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–27a) is reported at 356 F. 2d 955. The Board's Decision and Order (B.A. 2–58)[1] are reported at 146 NLRB 931.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1966 (Pet. 28a). By orders entered by Justices Fortas and Stewart, on June 2 and 30, 1966,

[1] "B.A." references are to the Board's record appendix, and "R.A." references are to petitioner's record appendix, filed in the court of appeals.

respectively, the time for filing a petition for certiorari was extended to and including July 29, 1966. The petition for certiorari was filed on July 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Board found that petitioner [1a] violated the National Labor Relations Act by unilaterally discontinuing certain of its operations and changing work assignment practices in order to aid one union (the ILA [2]) in its effort to absorb and supplant another union (the ILO [3]), which was certified as the bargaining representative of a segment of petitioner's employees. The following questions are presented:

1. Whether three of the Board's underlying findings—that ILO did not abandon its status as certified bargaining agent, that the strike called by it was attributable to petitioner's unfair labor practices, and that a "stevedore supervisor" was a supervisor within the meaning of the Act—were supported by substantial evidence.

2. Whether the Board was required to consider a prehearing settlement offer rejected by the Regional Director.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in Appendix C to the petition (pp. 29a–30a).

[1a] Petitioners Sea-Land Service, Inc. and Sea-Land of Puerto Rico are hereafter referred to as petitioner.

[2] International Longshoremen's Association, AFL–CIO.

[3] Insular Labor Organization.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. *The Creation of ILO.* Since 1960, petitioner has operated a cargo transport service from Newark, New Jersey, to Puerto Rico, making a weekly shipment to San Juan and Ponce in trailer van ships called "C–2's" (B.A. 7–9; 354–355, 298–300).[4] From the beginning of the service, ILA represented petitioner's stevedores and dock workers at its terminal facilities in San Juan and Ponce; it also represents petitioner's employees at various ports in continental United States (B.A. 8–11; 62–64, 104, 354–355).

In September 1961, petitioner's Ponce employees, members of ILA Local 1855, voted to disaffiliate from the ILA and to form an independent labor organization, ILO (B.A. 10; 356, 143, 251–252).[5] ILO petitioned the Board for an election, and, on June 8, 1962, the Board directed that one be held in a unit of stevedores and related employees at petitioner's Ponce terminal, with ILO and ILA appearing on the ballot (B.A. 10–11; 153–154, 353–360).

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[4] Petitioner, a corporation controlled by McLean Industries, Inc., maintains terminal facilities at various ports in continental United States (B.A. 7–8; 11; 59, 63–64).

[5] Local 1855 took this action because of its disagreement with a merger plan proposed, and subsequently adopted, by ILA leaders whereby most of the ILA locals would merge with UTM (Union de Tradajadores de Muelles) locals which had recently affiliated with ILA (B.A. 9; 362–375, 81–83, 248). Under the merger plan, Local 1855, with about 100 members, was to merge with UTM-ILA Local 1903, with a membership of 1,200, into a single local administered by the UTM local's president (B.A. 9; 363, 248–249, 83, 199, 298).

2. *Pre-Election Threats.* Immediately prior to the election, both petitioner and ILA threatened the Ponce employees that an ILO victory would result in a loss of work. On June 22, Supervisor Joe Brasseau told a group of Ponce stevedores that, if the ILO won the impending representation election, petitioner's ships would no longer come to Ponce and that petitioner would eliminate the practice of sending Ponce gangs to San Juan to handle the Ponce cargo received there (B.A. 15; 219–222, 428, 257–258, 121–122).[6]

On June 27, petitioner directed a C–2 scheduled to arrive in Ponce on June 29, to by-pass Ponce, although ILO officials had earlier complained that such action would favorably affect ILA's cause in the election to the detriment of ILO (B.A. 16; 446–447, 393–395, 403). The following day, several ILA officials told petitioner that the Ponce gang would be thrown in the river if they came to San Juan to unload the rescheduled C–2 (B.A. 17; 133, 301, 79). On the same day, ILA President Bradley demanded that ILO withdraw its representation petition and reaffiliate with the ILA, but ILO refused (B.A. 16–17; 259–260, 130). Two days before the election, Bradley told the ILO membership that they would

[6] Prior to the incidents involved here, the weekly C–2 would occasionally return directly to Newark from San Juan without continuing on to Ponce because of weather conditions or for economic reasons (B.A. 12; 125–128). In 1961 this happened on seven occasions (B.A. 12; 127, 361, n. 17). On these occasions it was petitioner's practice to send a 25-man gang of its Ponce stevedores to San Juan, to remove those trailers destined for Ponce, haul them by road to Ponce, and assign another 25-man gang at the Ponce warehouse to strip the trailers (B.A. 12; 154–156, 139–140, 159, 126–129, 226, 255–257).

lose their stevedoring work at Ponce if they voted for ILO in the Board election (B.A. 17; 392–393, 260–261, 222–224, 214–215, 428).

3. *Petitioner's Unilateral Changes in its Operations.* On July 2, ILO won the Board election—prevailing over ILA by a vote of 77 to 3. ILO was, therefore, certified as the bargaining representative of petitioners' Ponce employees (B.A. 11; 131, 351–352). Thereafter, petitioner unilaterally instituted numerous changes in its operations and practices which had the practical effect of diverting work from ILO members to ILA members. Petitioner discontinued all C–2 shipments to Ponce, although it continued to advertise that stop on its schedule and public announcements (B.A. 13, 42; 132, 137, 157–158, 139, 190, 376–379); it abandoned the practice of dispatching Ponce stevedores who were members of ILO to San Juan to unload from the C–2's those trailer vans destined by road for Ponce, assigning that work instead to ILA members in San Juan (B.A. 14–15, 43; 261–262, 92–96, 157–158, 164, 169); it reduced its Ponce warehouse gang from 25 employees to 8 or 10 (B.A. 15, 43; 263, 159–160, 164, 140); and it leased from a sister corporation, Waterman Steamship Corporation, another kind of trailership (known as a "C–4") for the weekly Ponce cargo shipments and utilized the Waterman port facilities in Ponce, manned by UTM–ILA stevedores, instead of its own facilities, although nothing in the "bare-boat" charters under which the C–4's were leased required petitioner to do so (B.A. 13–15, 42; 88–89, 432–441, 182, 142, 108–111, 138, 242, 75, 115–117, 179–181, 61–62, 64, 90, 203–204, 138–139).

4. *The ILO Strike.* After its election victory, ILO repeatedly sought a negotiating session with Montero, petitioner's Ponce terminal manager. After several delays, Montero informed ILO that he had no instructions from petitioner to meet with ILO (B.A. 18–19; 262, 404). Meanwhile, petitioner began instituting the numerous operational changes described above, and removed the tractors which it used at its Ponce terminal to haul trailer vans (B.A. 19–20; 262–263, 163, 140–142, 404, 158).

On July 19, 1962, ILO complained to Montero about the unilateral changes in operation, but Montero said he knew nothing about these matters since his instructions came from San Juan (B.A. 20; 262–264, 404, 225–227, 158–160, 169). On the same day, petitioner rejected ILO's proposal for a stipulation which would govern certain conditions of employment until an agreement was reached. Thereupon, ILO decided to strike in support of its demand that petitioner commence bargaining negotiations and reestablish its normal operational practices (B.A. 20–21; 264–265, 427, 313, 161).

That afternoon, ILO picketed petitioner's facilities at Ponce. The pickets carried signs demanding, *inter alia*, that "ships come to Ponce," that Ponce "gangs be sent to San Juan," and that petitioner "sit down and negotiate" (B.A. 21; 264–265, 161–163, 141, 239, 327). The picketing terminated the next day when public officials at Ponce informed ILO that petitioner had promised it would meet and negotiate with ILO in San Juan on July 21 and that its opera-

tional changes were temporary (B.A. 21–23; 265–266, 389–392, 175–179, 190–195).

ILO officials appeared in San Juan on July 21 for the promised negotiating session, but petitioner refused to bargain until ILO submitted a complete contract proposal. ILO submitted the contract proposal on July 24 and waited for a response from petitioner (B.A. 23–24; 267–268, 313, 323). On July 26 and July 30, petitioner removed two ILO officers from their former jobs at the Ponce terminal.[7] In light of this action, ILO immediately called a special meeting in which the members decided to demand that petitioner recognize their grievances, including petitioner's refusal to remedy any of the conditions which had caused the prior strike, its refusal to negotiate on July 21 as promised, and its failure even to acknowledge their contract proposal (B.A. 25; 386–387, 198, 164–169, 269–271, 196, 273, 326–328). Petitioner's Ponce officials refused to negotiate with ILO, asserting they had no authority to hear ILO's grievances. ILO immediately resumed the picketing of petitioner's Ponce facilities (B.A. 25–26; 271, 196, 168, 387). The pickets carried signs bearing the same legends as those used in the earlier strike, and also signs demanding reinstatement of David Mejias (B.A. 26; 197, 168–169, 308, 327). Shortly after the picketing began petitioner's representative, J. R. Prado, called ILO to determine what

[7] Ramon Mejias, ILO president, was discharged from his job checking cargo vans hauled by road from San Juan, but he was offered part-time work in the warehouse (B.A. 24; 269, 240, 299). David Mejias, ILO secretary, was relieved of his position as chief clerk (B.A. 24; 385, 151, 165).

provoked the strike. ILO President Mejias proceeded to enumerate the many grievances. Prado cautioned Mejias that ILO "was a small new union" (B.A. 26; 271–272, 158, 402).

On July 31, petitioner assigned the work in its Ponce warehouse, formerly performed by ILO, to UTM–ILA members and has continued in this practice since then, except for a few ILO members who applied for work in person to petitioner's terminal manager, Montero (B.A. 28–29; 229–236, 395–401, 198, 216, 284–285, 287–288, 293). On the same day, petitioner discharged its ILO gatemen and replaced them with an independent guard service (B.A. 29, 12, n. 28; 240–241, 423, 429, 422, 285–286).

5. *ILO's Attempt To Obtain Teamster Support.* On August 1, ILO petitioned Local 901, Teamsters[8] to accept the members of ILO into that local and to bargain on its behalf so long as such action did not jeopardize the certification the Board had issued to ILO (B.A. 31–32; 171–172, 315, 274). The Teamsters agreed to the request, but petitioner informed the parties that an amendment to the certification would be required before the Teamsters could bargain for ILO (B.A. 32; 448–449, 148, 274–275, 172). On August 28, the Teamsters informed ILO and petitioner that it had abandoned its effort to bargain on behalf of ILO (B.A. 36; 449–450, 316, 149).

On August 30, petitioner met with ILO and rejected ILO's proposed contract, but agreed to submit a contract proposal of its own (B.A. 34, 37; 317–318,

[8] International Brotherhood of Teamsters, Chauffeurs and Warehousemen, Independent.

174, 278–281, 451–452). Thereafter, despite reminders from ILO, petitioner failed to submit a counterproposal as promised (B.A. 37; 453–454). It also refused to heed ILO's requests for a resumption of negotiations (B.A. 37; 453–455), and it failed to appear at a bargaining session aranged by the Department of Labor (B.A. 38; 320–321, 468, 278). On September 17, ILO sent petitioner a revised contract proposal, in English (B.A. 38; 319, 467). On October 9, petitioner rejected an unconditional offer by the strikers to return to work. On October 11, it announced that all its Ponce cargo would be handled by Waterman (B.A. 35; 423–426). The parties met on three subsequent occasions in October and December, but no final agreement was reached (B.A. 38–39; 319–322, 330–331).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that petitioner violated Section 8(a)(1) of the Act by warning its stevedoring employees at Ponce on July 22, 1962, that they would lose their jobs if they selected ILO in the Board election, and by its indifference and stalling with respect to ILO's requests to discuss grievances and to bargain with petitioner (B.A. 39–40). The Board also found that petitioner, in violation of Section 8(a)(2) and (1) of the Act, contributed support to ILA's efforts to absorb and supplant ILO, by discontinuing the C–2 sailings to Ponce and by changing work assignment practices and diverting work to the ILA (B.A. 40). The Board found further that petitioner violated Sections 8(a)(5), (3) and (1) of the Act by unilaterally

installing the operational changes without negotiating with ILO, and by discriminatorily depriving ILO members of work and refusing to reinstate ILO members upon their unconditional offers to return to work after they struck on July 30, 1962, in protest against petitioner's unlawful conduct (B.A. 42–44).

The Board's order (B.A. 2, 50–58) directs petitioner to cease and desist from the unfair labor practices found, to bargain with the ILO, to reinstate the strikers with backpay, and to post appropriate notices.

C. THE COURT OF APPEALS DECISION

The court of appeals found that all of the Board's findings were supported by substantial evidence and enforced its order (Pet. 1a–27a). In addition, the court concluded that the record did not support petitioner's claim that the Board had violated the Administrative Procedure Act, by declining to consider an offer of settlement (Pet. 26a–27a).

ARGUMENT

The decision below turns on its particular facts and is not in conflict with the decision of any circuit. There is no occasion for further review.

1. Petitioner specifically challenges the Board's findings that (a) ILO did not abandon its status as certified bargaining agent; (b) the strike on July 30 was an unfair labor practice strike; and (c) "stevedore supervisor" Joe Brasseau was a supervisor within the meaning of the Act. These challenges raise only evidentiary issues which do not warrant review

by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. Moreover, the record amply supports the Board's findings on these issues.

(a) As the court below noted (Pet. 23a–24a), ILO conditioned its request for affiliation with Teamsters Local 901 upon the maintenance of its certified status with petitioner. Accordingly, when petitioner questioned the validity of ILO's certification under that arrangement, the Teamsters revoked its acceptance of ILO and so notified petitioner (*supra,* p. 8). These facts as well as petitioner's subsequent negotiations with ILO negate the suggestion (Pet. 10) that petitioner regarded ILO as having abandoned its certified status (B.A. 34, 37–39; 278, 174, 317, 451–452, 467, 319–321, 330–331). *Harbor Carriers of Port of New York* v. *National Labor Relations Board,* 306 F. 2d 89 (C.A. 2), certiorari denied, 372 U.S. 917, cited by petitioner, is distinguishable on its facts.

(b) It is equally apparent, as the court found (Pet. 20a–22a), that the strike on July 30 "was in protest of unfair labor practices as well as the discharge or demotion of David Mejias." Petitioner's assertion (Pet. 9) that the "sole cause" of the strike was the demotion of David Mejias* is belied by the evidence summarized above (pp. 6–8), that ILO pickets carried signs protesting petitioner's unfair labor practices, that the picketing immediately followed petitioner's refusal to hear ILO's grievances and demands for recognition, and that ILO explained to petitioner's

* The Board found that this demotion was not violative of the Act (B.A. 26–27, N. 3.).

officials at the outset that the strike was a protest against petitioner's unfair labor practices and would continue until petitioner "agreed to sit down to negotiate." Thus, the strike was prompted largely by petitioner's unfair labor practices; it did not lose its character as a protest against such practices merely because it also had another cause. See, *National Labor Relations Board* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269 (C.A. 2), certiorari denied, 375 U.S. 834; *National Labor Relations Board* v. *Stilley Plywood Co.*, 199 F. 2d 319, 320 (C.A. 4), certiorari denied, 344 U.S. 933; *Berkshire Knitting Mills* v. *National Labor Relations Board*, 139 F. 2d 134, 137 (C.A. 3), certiorari denied, 322 U.S. 747.[10]

(c) Similarly, Brasseau's supervisory status is clearly shown. Petitioner's highest official in Puerto Rico admitted that Brasseau was a "stevedore supervisor" (B.A. 121–122). Moreover, Brasseau gave instructions and orders to the hatch tender, who was foreman over 21 employees (B.A. 221, 219, 222). Contrary to petitioner's contention (Pet. 6) that the evidence relating to Brasseau's status was solely

[10] The cases cited by petitioner (Pet. 9–10) are not in point. *Cleaver-Brooks Mfg. Corp.* v. *National Labor Relations Board*, 264 F. 2d 637 (C.A. 7), certiorari denied, 361 U.S. 817, and *National Labor Relations Board* v. *Ford Radio & Mica Corp.*, 258 F. 2d 457 (C.A. 2), hold that a strike is not an unfair labor practice strike where the *sole* purpose is to protest the replacement of a foreman, or some other economic reason. Neither *National Labor Reldtions Board* v. *Retail Clerks International Association*, 211 F. 2d 759 (C.A. 9), certiorari denied, 348 U.S. 839, nor *National Labor Relations Board* v. *Florida Agricultural Supply Company, etc.*, 328 F. 2d 989 (C.A. 5), involved strike activity.

hearsay, petitioner's officials testified that his job entailed assisting the Marine Superintendent, who was in full charge of loading and unloading petitioner's ships, and that Brasseau would "take charge of everything" when the Marine Superintendent was absent (B.A. 329–330, 331–332, 180–181). In this capacity, Brasseau had authority to recommend discharge or other disciplinary action of the employees under his control (B.A. 332). He was, therefore, a supervisor within the meaning of Section 2(11) of the Act (29 U.S.C. 152(11)) [11] and, accordingly, petitioner was responsible for his unlawful conduct (see cases cited at Pet. 19a–20a).[12]

2. Petitioner further contends (Pet. 8–9) that the Board violated Section 5(b) of the Administrative Procedure Act (set forth at Pet. 26a, n. 7) by failing to consider an offer of settlement. The Board, by its rules, has specifically delegated the function of con-

[11] Section 2(11) defines the term "supervisor" to include, *inter alia:*

> * * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them * * * if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[12] *Precision Fabricators* v. *National Labor Relations Board*, 204 F. 2d 567 (C.A. 2), which petitioner cites as in conflict with the instant decision, is distinguishable on its facts. There, the employee involved spent 80 percent of his time operating a machine. The remainder of his time was spent giving out work assignments according to the explicit instructions of the production manager. He did no actual supervising, but merely "kept all hands busy on the work given him" by his superior (204 F. 2d 568).

sidering pre-hearing settlement offers to its Regional Directors (29 C.F.R. § 102.51). Here, in conformity with the rules, the Regional Director considered petitioner's settlement offer and rejected it as inadequate to remedy petitioner's unfair labor practices (R.A. 5a, 3a–4a, 10a). In these circumstances, Board consideration of the offer was not required.[13] Petitioner's refusal to offer the proposed settlement into evidence precluded judicial review of the Regional Director's determination of its inadequacy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1966.

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[13] *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F. 2d 204 (C.A. D.C.), certiorari denied, 364 U.S. 913, cited by petitioner (Pet. 9), is inapposite. There, because the rules of practice and procedure of the Federal Power Commission require offers of settlement to be made directly to the Commission itself (see 18 C.F.R. § 1.18(e)), a refusal by the Commission to consider a settlement proposal was found to be reversible error (283 F. 2d at 224).

U.S. GOVERNMENT PRINTING OFFICE: 1966